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SUPREME

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 348

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES, S.A., ETC.,
Petitioner,

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, As Successor to the Alien Property Custodian, and IVY BAKER PRIEST, TREASURER OF THE UNITED STATES, *Respondents.*

PETITIONER'S BRIEF

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INDEX

	Page
Opinions Below	3
Jurisdiction	4
Questions Presented	4
Constitutional Provisions, Statutes and Rules Involved	6
Statement of the Case	6
I. Summary of Important Facts	7
II. Chronological Statement	9
Petitioner's property vested under the Trading with the Enemy Act	9
Petitioner's administrative claims denied without a hearing	9
Petitioner's complaint for return of its property	10
Pretrial discovery orders	11
Initial failure to obtain Sturzenegger records	13
Petitioner's complaint dismissed for involuntary inability to comply with discovery order	15
Tender by petitioner of substantial discovery	17
Offer of full investigation of remaining Sturzenegger files by joint discovery procedures	20
Denial of jurisdiction affirmed despite tender of substantial discovery and possibility of additional joint discovery procedure	21
Summary of Argument	22
Argument	25
I. The Trial Court Had No Power to Dismiss the Complaint in the Absence of a Finding of Wilful Refusal To Comply With Discovery Order	25
(a) Rule 37 F.R.Civ.P. did not authorize dismissal of petitioner's complaint	25

Page

(b) Dismissal was not on the merits and therefore it violated the Fifth Amendment, as construed by this Court 31

(c) Dismissal was predicated on an invalid discovery order 34

Mutuality 35

Control 36

Discretionary Nature 37

II. The Finding That Petitioner Failed to Make Discovery is Defective in View of the Tender of Substantial Compliance and of Other Efforts to Supplement it if Necessary 39

(a) Refusal to inspect over 200,000 records tendered by petitioner as substantial compliance was arbitrary and a denial of due process 39

(b) Full investigation of the remaining records as suggested by the Swiss Government would have insured complete discovery and thus dismissal was unnecessary 40

III. Denial of Jurisdiction in this Case Contravenes the Trading With The Enemy Act and Transforms Vesting Into a Taking of Private Property Without Due Process of Law 43

Conclusion 45

Appendix 1a

Fifth Amendment, United States Constitution 1a
Section 5(b), Trading with the Enemy Act, Title 50, U.S.C., App. § 5(b) 1a
Section 9(a), Trading with the Enemy Act, Title 50, U.S.C., App. § 9(a) 2a
Rule 30(b), Federal Rules of Civil Procedure 3a
Rule 34, Federal Rules of Civil Procedure 4a
Rule 37, Federal Rules of Civil Procedure 5a

TABLE OF CASES

Page

Aktiebolaget Vargos, et al. v. Clark, D.C.D.C. 1949, 8 F.R.D. 635 37
Bas v. Steele, 3 Wash. C. C. 381, 2 Fed. Cas. p. 988 Case No. 1088 28
Carpenter v. Winn, 221 U.S. 533 ..... 28, 30
Clark v. Uebersee Finanz-Korporation, 332 U.S. 480 ..... 6, 7, 10, 24, 43, 44
Cummings v. The State of Missouri, 4 Wall. 277, 327 .. 31
Danwiller v. Myers (1883), W.N. 58, C.A. 31
Duell v. Duell, C.A. D.C. 1949, 85 U.S. App. D.C. 78, 83, 178 F. 2d 683, 689 32
Fisher v. United States Fidelity & Guaranty Co., C.C.A. 7th, June 18, 1957, 246 F. 2d 344, 24 Fed. Rules Serv. 37b. 243, Case 3 36
Fraser v. Burrows (1877), 46 L.J. Q.B. 501, 2 Q.B.D. 624 36
Gray v. Hancock (1887), 56 L.T. 726 31
Hadley v. MacDougall (1872), 7 Ch. App. 312 36
Haigh v. Haigh (1885), 31 Ch. D. 478, 482 31
Hammond Packing Co. v. Arkansas, 212 U.S. 322 ..... 4, 16, 22, 23, 26, 28, 29, 30, 31, 32, 35, 36, 43
Hartley v. Owen (1876), 34 L.T. 752 31
Hawkes v. Schubach (1953), V.L.R. 468, 2 A.L.R. 874 (Australia) 36
Hickman v. Taylor, 329 U.S. 495 ..... 23, 35, 37, 42
Hovey v. Elliott, 167 U.S. 409 ..... 4, 23, 31, 32, 43, 44
In Re Harris (D.C. N.Y. 1939) 27 F. Supp. 480 36
"Interhandel Case", Confederation of Switzerland v. United States of America, I.C.J. Reports, 1957, p. 105 7
Karlsson v. Wolfson, D.C. Minn. 1956, 18 F.R.D. 474 37
Kearsley v. Philips (1883), 10 Q.B.D. 36, 40, 465-7 36
Maestas v. American Metal Co. of New Mexico (1933), 20 P. (2d) 924, 925, 37 N.M. 203 26
Maye v. Carbery, (C.C.D. of C. 1822) 2 Cranch C.C. 336, 2 Fed. Cas. p. 1229, Case No. 9339 28
McMullen v. Squier (1944), CCA 9th, 144 F. 2d 703 .. 34
Merchant's Nat. Bank v. Nat. Bank of Commerce, 3 Cliff. 201, 17 Fed. Cas. p. 53, Case No. 9448 28
Munroe v. United States (1914), C.C.A. 1, 216 F. 107 .. 35, 36

Page

Nelson (James) & Sons, Ltd. v. Nelson Line (Liverpool), Ltd. (1906), 2 K.B. 217, C.A. 31
Roth v. Paramount Distributing Corp. (D.C. Pa. 1948), 8 F.R.D. 31 28
Service Liquor Distributors, Inc. v. Calvert Distillers Corporation (D.C. N.Y. 1955), 16 F.R.D. 513 41
Société Internationale, etc. v. Brownell, 350 U.S. 937, reh. den. 350 U.S. 976 (1956) 3, 17
Société Internationale, etc. v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532, reh. den. 2, 4, 17, 27
Société Internationale, etc. v. Brownell, 243 F. 2d 254 .. 4, 22
Société Internationale, etc. v. McGranery, 111 F. Supp. 435, ... 2, 3, 27
Standard Oil v. Markham (D.C. N.Y. 1944), 57 F. Supp. 332 44
State v. Harland (Ohio Com. Pl. 1951), 105 N.E. 2d 293, 295 26
Stoehr v. Wallace, 255 U.S. 239 ..... 6, 10, 24, 44
Taylor v. Mason (1824), 9 Wheat. 325, 343, 344 26
Thompson v. Selden, 20 How. 194, 15 L. Ed. 1001 28
Tot v. United States, 319 U.S. 463 ..... 23, 34
U.S. Bank v. Kurtz, (C.C.D. of C. 1822) 2 Cranch C.C. 342, 2 Fed. Cas., p. 702, Case No. 920 28
Valenstein v. Bayonne Bolt Corp. (D.C. N.Y. 1946), 6 F.R.D. 363 ..... 28, 30
Wilson v. Raffalovich (1881), 7 Q.B. 553, C.A. 31

CONSTITUTIONAL PROVISION, STATUTES AND TREATY

28 U.S.C. Section 1254(1) 4
Fifth Amendment, Federal Constitution 6, 7, 1a
Judiciary Act of 1789, Article 15 28
Swiss-Allied Accord ("Washington Accord") (1946) 14 St. Dept. Bull. 1101-2, 1121-24 ..... 7, 12
Trading with the Enemy Act, 50 U.S.C. App. Section 5(b) 7, 9, 43, 1a
Trading with the Enemy Act, 50 U.S.C. App. Section 9(a) 2, 7, 22, 43, 2a
Trading with the Enemy Act, 50 U.S.C. App., Section 32 10

RULES

Page

Rule 30(b), Federal Rules of Civil Procedure ...37, 41, 3a
Rule 34, Federal Rules of Civil Procedure ..5, 11, 16, 20, 23, 25, 35, 36, 37, 4a
Rule 37, Federal Rules of Civil Procedure ..4, 14, 15, 22, 25, 26, 27, 31, 35, 5a
Rule 41(b), Federal Rules of Civil Procedure 27

TREATISES & ARTICLES IN PERIODICALS

American Journal of International Law, (July, 1957) Vol. 51, No. 3, p. 517 7
Black's Law Dictionary, Third Edition (1933), p. 1515 26
10 Halsbury's Laws of England, Vol. 10, pp. 362-3, 398 31
Moore's Federal Practice, 2d Ed., Vol. 4, pp. 2444-48 39

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PETITIONER'S BRIEF

The order of this Court, dated October 14, 1957, granting certiorari in this case, reads as follows:

"The petition for a writ of certiorari * * * is granted. Counsel are invited to discuss, among other things, the power of the District Court to dismiss, and the propriety of its dismissal, of petitioner's complaint, under Rule 37(b)(2) of

> F.R.C.P., for *failure* to obey its order, for production of documents, issued under Rule 34 of F.R.C.P., in the absence of evidence and of finding that petitioner 'refuses to obey' such order. * * *, R. 2090.

Petitioner's[1] complaint in the District Court, seeking recovery of vested property under Section 9(a) of the Trading with the Enemy Act (50 U.S.C. App. 9a), was dismissed at the pretrial stage for failure—not wilful refusal—to comply with a discovery order to produce, not its own records, but the records of a private Swiss bank—H. Sturzenegger & Cie., Basle—with which it had close business connections.

The District Court's dismissal of December 21, 1953[2] was affirmed by the Court of Appeals on June 30, 1955,[3] subject to the following modification:

> "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits."

A petition for a writ of certiorari to this Court, presenting, *inter alia*, the question posed in this

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[1] Petitioner is a Swiss holding corporation having its domicile at Basle, Switzerland. For sake of brevity, petitioner is known as "I.G. Chemie" or "Interhandel".

[2] The District Court's principal opinion is reported in 111 F. Supp. 435, *sub nom.* Société Internationale etc. v. McGranery.

[3] *Société Internationale etc.* v. *Brownell*, 96 U.S. App. 232, 225 F. 2d. 532, reh. den.; this decision was in its case number 12,140, R. 2028 to 2046 [R. . . . stands for the page number of the printed record in ths Court].

Court's order of October 14, 1957, was denied 350 U.S. 937, reh. den. 350 U.S. 976.

The six-months' grace period, provided for in the Court of Appeals' modification, began to run on January 24, 1956. Before it expired, petitioner sought extensions, tendered substantial compliance and proposed a plan if any relevant documents remained unproduced. All were refused by the District Court. Judgment of dismissal with prejudice was entered on August 3, 1957 upon the Court of Appeals' mandate for alleged failure to perform the discovery order, R. 2017 and on August 21, 1956, the District Court denied petitioner's motion to vacate the dismissal order on the mandate, R. 2026.

Appeals were prosecuted to the Court of Appeals from the foregoing adverse actions of the District Court,[4] and the Court of Appeals affirmed on April 11, 1957.[5]

OPINIONS BELOW

The District Court's principal opinion, referred to in footnote 2 of this brief, is reported in 111 F. Supp. 435. The District Court also wrote a short, unreported

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[4] The record in #12,140 is treated as a part of the record in the appeals decided April 11, 1957, and as a part of the record in the instant case in this Court.

[5] R. 2058. In this opinion, the Court of Appeals briefly described the orders appealed from as orders which had "dismissed plaintiff's complaint with prejudice." Indeed, this was the first time such finality had actually occurred, in view of the modification in the Court of Appeals' earlier opinion of June 30, 1955, and the fact that the six-month grace period had not begun to run when certiorari was applied for and denied in 350 U.S. 937 (1956). See petition for rehearing in No. 500, October Term 1955, which was denied 350 U.S. 976 (1956).

memorandum opinion in relation only to its order of July 11, 1956, R. 1975. The opinion of the Court of Appeals of June 30, 1955 is reported at 96 U.S. App. 232, 225 F. 2d 532, reh. den. The opinion of the Court of Appeals of April 11, 1957 is reported at 243 F. 2d 254.

JURISDICTION

The judgment of the Court of Appeals with respect to which the writ of certiorari was sought was entered on April 11, 1957, R. 2061. Order denying petition for rehearing was entered May 10, 1957, R. 2069. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petition for writ of certiorari was granted October 14, 1957.

QUESTIONS PRESENTED

1. Since Rule 37 F.R.Civ.P. permits the courts in their discretion to strike pleadings only if a party "refuses to obey" a discovery order, may the lower courts properly dismiss petitioner's complaint because of its involuntary failure to comply with a discovery order despite *bona fide* efforts to procure the required records, where there is no evidence or finding of *wilful refusal* to comply?

2. May the lower courts dismiss petitioner's complaint with prejudice but without adjudication on the merits, for its involuntary inability to comply with a discovery order, where this Court has held in *Hovey* v. *Elliott*, 167 U.S. 409, that the striking of any pleadings without an adjudication on the merits is a denial of due process of law, and where this Court subsequently held in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 that, in line with the *Hovey* ruling, pleadings may

only be stricken if, after a *wilful refusal* to make discovery, a presumption of bad faith in the pleadings can properly be inferred, and the striking is thus on the merits?

3. May the lower courts order production of records for discovery before trial under Rule 34, F.R.Civ.P., where it is shown that the records are neither in the possession nor custody of petitioner, and where the trial court itself concluded that petitioner does not have sufficient control over the records to bring about their release by their owners and thus to produce them for discovery?

4. May the trial court, which had failed to designate the records to be produced with sufficient particularity to allow them to be identified, dismiss petitioner's complaint for involuntary inability to make discovery

(a) without even considering petitioner's claim that over 200,000 records it has obtained and tendered to respondents constitute substantial discovery; and

(b) where other joint discovery procedures, recommended by the Swiss authorities, could have identified all remaining relevant records, if any be still undisclosed, and permitted their discovery by letters rogatory?

5. May a court deny jurisdiction by dismissing with prejudice, for a plaintiff's involuntary inability to comply with a pretrial discovery order, a complaint for return of property summarily vested under the Trading With the Enemy Act, without adjudication on the merits of the issues presented, where suit was properly filed and all jurisdictional requirements were met, and

(a) there never was any administrative hearing or determination that the property was owned by enemies;

(b) the Trading with the Enemy Act gives divested owners a right to have the vesting reviewed in federal courts and to recover their property if found to be neither enemy nor enemy tainted, *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480; and

(c) this Court has held that unless the non-enemy owner is given an opportunity to obtain a complete judicial review of the vesting, any taking of property under the Trading With the Enemy Act would be violative of the Fifth Amendment to the Federal Constitution, *Stoehr* v. *Wallace*, 255 U.S. 239?

6. Is the summary vesting of petitioner's property under the Trading With the Enemy Act valid under the Fifth Amendment to the Federal Constitution if petitioner, through no fault on its part, is denied access to federal courts on its claim that it is neither enemy nor enemy tainted and thus is entitled to return of its property?

CONSTITUTIONAL PROVISION, STATUTES AND RULES INVOLVED

The pertinent constitutional and statutory provisions and rules of procedure are printed in the Appendix to this brief.

STATEMENT OF THE CASE

In the proceedings here reviewed petitioner attempted to have the issues of fact and of law raised by respondents' taking of its property passed upon by

Federal Courts, as required by the Trading With the Enemy Act, Section 9(a), 50 U.S.C. App., and by the Fifth Amendment to the Federal Constitution. The courts below denied jurisdiction over these issues after concluding that petitioner, though willing, would be unable to comply with a pretrial discovery order.

I. SUMMARY OF IMPORTANT FACTS

Several undisputed facts and developments in this case are of particular significance in evaluating petitioner's position:

(1) Respondents *seized* petitioner's property under the authority of the Trading With the Enemy Act, 50 U.S.C. App., § 5(b). The Act authorizes provisional vesting of any foreigner's property, but not the permanent retention of property of friendly aliens, *Clark* v. *Uebersee Finanz-Korporation*, 332 U.S. 480.

(2) Respondents have *retained* the seized property without any determination that petitioner was an enemy or enemy tainted or that it did not have title to the vested assets. Respondents have been unwilling to submit these issues—which are of fundamental importance under the Trading With the Enemy Act—to judicial scrutiny of any sort.[6] Consequently, no evi-

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[6] Although entitled to do so, respondents also refused to participate in or to appeal from proceedings carried out by the Swiss Compensation Office and the Authority of Review, which investigated under authority of the Swiss-Allied Accord (1946) 14 St. Dept. Bull. 1101-2, 1121-24, respondents' charge that petitioner was enemy or enemy controlled. The investigative agency and the Authority of Review found these accusations to be unfounded, R. 205-261, R. 262-324. See, also, the several opinions of the judges of the International Court of Justice, handed down on October 24, 1957 in *"The Interhandel case", Confederation of Switzerland* v. *United States of America*, I.C.J. Reports 1957, p. 105; and American Journal of International Law, (July, 1957) Vol. 51, No. 3, page 517.

dence in support of respondents' claim that they are entitled to retain these assets under the Act, has ever been produced in or passed upon by a court.

(3) The only reason for which the lower courts denied jurisdiction on the merits of petitioner's statutory claim for return of its seized property was petitioner's alleged inability, despite *bona fide* efforts, to comply with a pretrial discovery order, R. 147.

(4) Petitioner had been ordered *inter alia* to produce records of a Swiss bank, R. 340. These records were not in petitioner's possession or custody, R. 396-97. Petitioner had no access to them and had no control over their production either in fact or as a matter of right, R. 396-7; 517; 1813-25. Moreover, the bank's records ordered to be produced were not designated with sufficient particularity to allow their identification, R. 397-9.

(5) The lower courts denied jurisdiction after finding that petitioner had attempted in good faith to comply with the discovery order, R. 610-11, but that, although it had sufficient "control" over the bank's records for purposes of the discovery order, it did not have sufficient "control" over the same records to insure their production in compliance with that order, R. 672-73; 1998-2000.

(6) It is nowhere shown that the bank's records contain material in any way damaging to petitioner's claim. The Swiss Compensation office which investigated petitioner, *supra*, footn. 6, p. 7, found for petitioner on the issues raised at bar, R. 205-324.

(7) The final order denying jurisdiction for petitioner's alleged involuntary failure to produce the bank's records was entered over petitioner's claim that it had in the meantime substantially complied with the discovery order, and that additional discovery, if any were needed, could be obtained by joint discovery procedures authorized by the Swiss Government, R. 1954-55; 2011-14. Neither respondents nor the lower courts ever examined the more than 200,000 records and the books of account obtained by petitioner at great expense and tendered as best possible proof of substantial discovery.

(8) Respondents expressly refused to assist petitioner in its efforts to bring about discovery of the Sturzenegger records, R. 598-9; 601-03; 627; 784; 1956-61.

II. CHRONOLOGICAL STATEMENT

Petitioner's property vested under the Trading With the Enemy Act

Between the years 1942 and 1946 the Alien Property Custodian vested petitioner's property[7] under authority of Section 5(b) of the Trading With the Enemy Act.

Petitioner's administrative claims denied without a hearing

Petitioner filed administrative claims for the return of its property on the ground that it was not an enemy but a friendly neutral. These claims were summarily

[7] Valued at over $100 million dollars and consisting of cash and approximately 90% of the stock of General Aniline & Film Corporation, a Delaware Corporation doing business in New York City and elsewhere in the United States.

rejected by respondent on the ground that such return would not be in the national interest.[8] There was no hearing and no determination that petitioner was not, as claimed, a friendly neutral, or that it had no title to the property.

Petitioner's complaint for return of its property

On October 21, 1948, petitioner filed a complaint in the United States District Court for the District of Columbia against respondents' predecessors, R. 148-162. This complaint prayed for return of the vested property on the ground that petitioner was neither an enemy nor an ally of an enemy, and that under Section 9(a) of the Trading With the Enemy Act and the Federal Constitution the Alien Property Custodian was compelled to return property vested under Section 5(b) of the Act if shown that it was not owned by enemies or allies of an enemy. *Stoehr* v. *Wallace*, 255 U.S. 239; *Clark* v. *Uebersee*, 332 U.S. 480.

Respondents filed an answer to this complaint. The only issues are whether, under the doctrine of the *Uebersee* case petitioner was "enemy tainted," and whether it really owned the vested property. Neither of these issues has come to trial.

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[8] It should be noted that, although authorized to do so by Section 32, Trading with the Enemy Act, 50 U.S.C. App., respondents *chose not* to reject petitioner's claim on the ground that petitioner was enemy or enemy-controlled, or that it did not have title to the property.

Pretrial discovery orders[9]

In 1949, R. 197. respondents moved for discovery under Rule 34, F.R.Civ.P. The trial court thereupon ordered that, in addition to its own records and to those of a wholly owned subsidiary known as Osmon, A. G., petitioner *attempt*[10] to produce a stated number of

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[9] Prior to petitioner's suit and in the early years of litigation, both petitioner and respondents were able to obtain evidence by depositions and discovery. Respondents had collected in Germany and in liberated countries some 23,000 *relevant* documents, many of them from the files of the alleged German co-conspirators, R. 61. With the exception of records withheld, presumably on the claim of privilege, these documents were inspected by petitioner. Respondents took the depositions of several key personalities connected with the creation and early history of petitioner corporation, R. 1826, 1865; they took the deposition of Dr. Hans Sturzenegger, a director of petitioner and partner with unlimited liability in the Sturzenegger bank; his deposition took several months and filled over 6000 pages of record testimony, R. 755 to 1561. Interrogation covered not only matters concerning petitioner, but also the bank and its predecessor, R. 342-45. The witness was not allowed to decline to answer on the ground of Swiss secrecy laws, R. 356. Respondents were able to interrogate Mr. Germann, general manager of petitioner, R. 690-748. They have inspected petitioner's own records and have been offered the opportunity to inspect many more Sturzenegger bank records than the Court had ordered to be produced, and to gain insight into all the remaining bank files, R. 609.

[10] Faced with petitioner's objections, *infra*, p. 12, the trial court recognized at the time it issued the discovery order that petitioner might not have the power to bring about discovery of the bank's records. It justified its order with the following comment:

> "Of course, if you have a doubt about whether they have control or not, one quick way to resolve it is to order them to do it, and if they do not do it and make a good effort, acquit them.", R. 42. (cf. also R. 41)

In view of the "doubts" referred to by the Court, the discovery order was predicated only on a "*prima facie*" finding of control.

records which had been inspected by the Swiss Compensation Office in its investigation of the Swiss nature of petitioner, *supra,* footnote 6.[11] Since the Sturzenegger bank and its predecessor, Ed. Greutert & Cie., had been petitioner's house bank, petitioner readily admitted the general relevancy of their records for purposes of discovery. It has no way of knowing, however, what the exact contents of the Sturzenegger records are. In particular, it has never been shown that the Sturzenegger records contain any material detrimental to petitioner's position and in support of respondents' claims. Indeed, all indications are to the contrary, *supra,* pp. 8-9.

Petitioner objected to that part of the discovery order requiring it to produce Sturzenegger Bank records. It pointed out in particular that it had no right to inspect or to demand production of the bank's records, R. 396-

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Later, however, when it was shown that petitioner would not be able to bring about discovery except by onerous waiver proceedings, *infra,* p. 17, the trial court predicated its denial of jurisdiction upon a *definitive* ruling of "*control*" although no new evidence had been introduced to support it, R. 615. When requested by petitioner to make specific findings of fact in support either of its assertion that petitioner had sufficient "control" for Rule 34, or of its assertion that petitioner's "control" was *not* sufficient to insure full discovery, the trial court declined to do so, R. 147; 2013; 2026.

[11] The trial court ordered petitioner to produce, *inter alia,*

"* * *

(a) The some 700 jackets and 140 account books on the premises of I.G. Chemie and H. Sturzenegger & Cie.; *examined in the course of the investigation of the German character of I.G. Chemie by investigators of the Swiss Compensation Office in 1945 and 1946.*" (R. 339-342; emphasis ours)

As to the bank's records, the Swiss Compensation Office, acting under the authority of the Swiss-Allied Accord or "Washington Accord", (1946) 14 State Dept. Bull. 1101-2; 1121-24, had examined some 55,000 documents and 110 books of account, R. 199.

97, and that furthermore such production would run counter to Swiss criminal laws, R. 405-412. The trial court nevertheless

(1) ordered production of a large number of unidentifiable[12] records; and

(2) ordered *petitioner* to produce records (not exclusively related to petitioner's dealings with the Bank) which were not its own, but those of a bank not a party to the proceedings, and to which petitioner did not have access as a matter of right, R. 1815, of law, R. 545-47, or of fact, R. 396-99.

Initial failure to obtain Sturzenegger records

When the time came for petitioner to comply with the discovery order, it produced substantially all its own records[13] but was unable to obtain the Sturzenegger records, not merely because it had no right or power to bring about their production, but also because, in order to prevent violation of Swiss criminal laws and to protect the proprietary right given under Swiss law to bank customers to keep their records from being dis-

[12] Under the discovery order, petitioner is obliged to produce some 55,000 documents and 110 books of account of the Sturzenegger bank inspected by the Swiss Compensation Office in 1945-6, R. 199. At that time, however, the inspected documents were put back in their original jackets and nobody could thereafter positively identify them among the other records of the bank, R. 399.

[13] Respondents contested the completeness of petitioner's production and moved for additional discovery. Such motion, together with a similar motion of petitioner for discovery of several thousand records withheld by respondents, R. 597, was still pending before the Special Master appointed by the trial Court at the time of the dismissal in 1953. Consequently, those controversies are not part of the present review.

closed, the Swiss Federal Attorney had impounded such records a few days before discovery became due, R. 435.

Thereupon, respondents charged a conspiracy and collusion between the Swiss Government and petitioner to evade discovery, and moved under Rule 37, Federal Rules of Civil Procedure to dismiss petitioner's complaint as sanction for its failure to produce the Sturzenegger records,[14] R. 417. The District Court referred this matter to Special Master William J. Hughes, R. 452-459. After a detailed investigation the Special Master found *inter alia*:

(1) That petitioner had attempted in good faith to have the Sturzenegger records released, R. 468, 545;

(2) That there had been no conspiracy or collusion between the Swiss Government and petitioner, R. 545;

(3) That under Swiss law bank customers have a right to demand that records concerning them be not disclosed, R. 541, 547;

(4) That when the Swiss Government impounded the Sturzenegger bank's records it did so to protect bank customers' rights and to prevent

[14] A similar motion to dismiss petitioner's complaint had been made in 1949 when Dr. Sturzenegger—one of petitioner's directors—had been compelled to postpone appearance for his deposition due to illness. The charge at that time was that Dr. Sturzenegger was malingering in order to evade interrogation, and that the reputable Swiss physicians who had advised him to postpone his trip to the United States were incompetent. Judge Morris of the District Court found that these charges were entirely unfounded, R. 346, 355, and denied respondent's motion to dismiss under Rule 37 F.R.Civ.P.

violation of economic espionage laws of Switzerland, R. 546; and

(5) That petitioner was unable to obtain the records from the bank unless special authorizations (waivers) were received from the bank customers consenting to the production of records pertaining to them, R. 547.

Petitioner's complaint dismissed for involuntary inability to comply with discovery order

"On September 8, 1952 respondents filed exceptions to the Special Master's report in the trial court. They also renewed their motion under Rule 37 F.R.Civ.P. to dismiss petitioner's complaint, demanding that such sanction be imposed regardless of whether or not petitioner had sought in good faith to make discovery, R. 553, 601-03. Petitioner moved for adoption of the Special Master's report and to be relieved from the obligation to produce the bank's records, since they were not in its possession, custody or control as required by the Rules.

The trial court ratified the Special Master's findings and conclusions in their entirety. It nevertheless affirmed its original discovery order after holding that, although petitioner had no access to the Sturzenegger records as a matter of right or as a matter of fact,[15]

[15] Much has been made of the relationship between a so-called Basle Circle of companies and individuals, the Sturzenegger bank and petitioner, as a basis for "control". While it is readily admitted that the bank and its predecessor were petitioner's house bank and that throughout its history petitioner had a very close business relationship with the bank and the "Basle Circle", the fact remains that petitioner had no control, proprietary or otherwise, direct or indirect, over the Sturzenegger bank. As to peti-

petitioner had sufficient "control" over them to satisfy the requirements of Rule 34, Federal Rules of Civil Procedure, R. 615. A period of grace was allowed before the dismissal would become effective, and during that time petitioner undertook to obtain the Sturzenegger records by soliciting consents from the individual customers of the bank. By October, 1953 it had obtained and tendered for inspection over 63,000 Sturzenegger documents, R. 664-67. Respondents and the trial court refused even to look at these record. R. 666. While on the one hand affirming its earlier conclusion that petitioner had sufficient "control" over the bank's records to satisfy Rule 34, the trial court now held that petitioner did not *in fact* have sufficient power over them to assure full production. Consequently, the court held that, since petitioner was not *able* to bring the required records before the court, its complaint would have to be dismissed with prejudice but without trial of the issues framed by the pleadings, R. 672-73.[16] No specific findings of fact

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tioner's *control over the records* of the Sturzenegger bank, it is expressly negated in a now terminated contract by virtue of which petitioner had a minority investment in the Sturzenegger bank with a very limited voice in management matters, R. 1813 to 1826. This contract denies petitioner any direct access to the bank's files, R. 1815. Obviously, therefore, there is no justification for a finding of "control" by petitioner over the bank's records.

[16] The trial court did not intend dismissal as a punishment for refusal to comply with a discovery order, nor could it infer a presumption of bad faith in the pleadings, as in *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322. "The issue", in the trial court's own words, "* * * is one of jurisdiction", R. 618; in other words, respondents could not be compelled to submit their summary seizure of petitioner's property to judicial scrutiny until all Sturzenegger records ordered produced had been made available to the parties and the court at pretrial.

were made, despite petitioner's request, R. 147, 2013, 2026, either as to "control" over the Sturzenegger records or as to petitioner's alleged inability to bring about release of the records by soliciting consents from the individual customers of the bank. A motion to require respondents to cooperate in such an individual consent or "waiver" procedure was denied, R. 627.

An appeal was taken from this order of dismissal. The Court of Appeals affirmed the ruling below, reiterating the fact that dismissal was neither a punishment nor the result of a presumption of bad faith, but holding that if the Sturzenegger records were not made available the Court had to decline jurisdiction over petitioner's complaint. However, the affirmance of the Court of Appeals was with the following modification:

> "One modification, however, we deem advisable, namely, that dismissal of the complaint with prejudice shall not become effective until six months after the receipt by the District Court of the mandate of this court in this case, and not then if within such period discovery is made as ordered. This will afford another opportunity to bring the case on for a trial and decision on the merits."

96 U.S. App. D.C. 232, 243, 225 F. 2d 532, reh. den., R. 2048. A petition for a writ of certiorari to this Court was denied, 350 U.S. 937, reh. den. 350 U.S. 976.

Tender by petitioner of substantial discovery

After denial of certiorari and during the six-months period which began January 24, 1956, petitioner, with the assistance of the Swiss Government, continued its efforts to obtain release of the Sturzenegger records by

soliciting express consents from the bank's customers.[17] By July 24, 1956—when the six-months' period expired—more than 190,000 Sturzenegger records had been obtained and tendered for discovery, R. 2012.[18] Petitioner submitted to the trial court that it was very likely that these records represented substantially all those covered by the order. Numerically, many more records were tendered than petitioner had been ordered to produce.[19] As to their nature, the bank records thus obtained were those pertaining not only to petitioner and its affiliates, but also to all persons and companies controlled by or close to petitioner and the Sturzenegger bank, and to the German and other foreign firms and individuals with which petitioner had dealings and for which it could conceivably have acted as

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[17] Under Swiss law, bank customers have a vested right that information concerning them be not disclosed by the bank. Accordingly, petitioner and the Sturzenegger bank had to address to the bank's customers letters *requesting their consent* to the production of the Sturzenegger records as ordered. Petitioner *began* by seeking consents from the persons and firms whose names had been connected with it and with the issues raised at bar. Cf. *infra*, footn. 20. "Secondary waivers" were obtained from additional persons or firms mentioned in the records of such "primary" bank customers. Once "consents" or "waivers" were obtained the bank submitted to the Swiss Attorney General or his representatives the records concerning the assenting customer. If the consents were found to be in proper order the records were turned over to petitioner which in turn tendered them to respondents.

[18] Thereafter, and up to the time of argument of the consolidated appeals in the Court of Appeals, more than 25,000 additional records were obtained, R. 2052; R. 2056.

[19] The discovery order, *ante*, footn. 11, demanded production of 55,000 records and 110 books of account; petitioner provided in excess of 200,000 records and the books of account to the extent they were covered by waivers.

a cloak.[20] As to the 110 Sturzenegger books of account which petitioner was ordered to obtain and produce,

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[20] In the course of the good faith proceedings before the Special Master, respondents supplied a list of 124 names of companies and individuals "close to petitioner" from whom petitioner could, in their opinion, have obtained waivers of secrecy rights, R. 720. Respondents asserted that:

> "This list suggests the enormous number of documents which could have been freed for inspection by waivers. *We dare say for all practical purposes these documents amount to the total of all the Sturzenegger papers.* (Emphasis ours, R. 468).

Petitioner used this list as a *starting point* in its efforts to obtain waivers of secrecy rights. But as this undertaking progressed, new names were added because petitioner believed that other companies, individuals or special accounts might have records in the bank relevant to the issues at bar and/or that they were inspected by the Swiss Compensation Office. On the other hand, several of the names originally listed by respondents turned out to have no records in the bank. As a result of petitioner's efforts papers concerning most of the crucial names were obtained and brought to Washington, R. 668, 1928, 1945, 2056. This being so, respondents' own words assert that these documents amount for all practical purposes to the total of all the Sturzenegger papers.

Despite their earlier statement, respondents asserted later, when confronted with the fact that petitioner had obtained waivers on the basis of the list originally furnished by them, that they were aware of "well over 50 additional names, largely of German and Farben-connected companies and individuals which had business transactions with Struzenegger", (R. 1942; cf. also Brief in Opposition to Petition for Certiorari herein, p. 5, footn. 4). Petitioner immediately wrote respondents asking for these additional names so waivers could be requested from them. Respondents declined to do so, R. 1950. Their refusal to cooperate with petitioner to bring this difficult pretrial discovery procedure to successful completion, even if such cooperation would only have required them to indicate names from whom they believe that waivers should be obtained, is highly significant. In this instance, their cooperation would have been particularly desirable in view of the fact that the discovery order did not designate with any degree of adequacy the records to be produced.

they have been tendered for examination in Switzerland to the extent that they are covered by waivers, R. 1951.

Offer of full investigation of remaining Sturzenegger files by joint discovery procedures

Since the records to be produced had not been designated in the discovery order with sufficient particularity to permit them to be identified, R. 399, petitioner could not without further clarification from the court know whether it had obtained every paper required to be produced. For that reason, and to be certain that all relevant records of the bank—whether or not covered by the discovery order—would be available for trial, petitioner suggested certain alternate discovery procedures designed to bring to light information as to any relevant records remaining in the bank's files, R. 1951-5. These additional discovery procedures had been proposed by the Swiss Government; they consisted mainly of the appointment by the parties of an independent investigator charged with examining all the remaining files of the Sturzenegger bank. Any "relevant" material[21] remaining there could be described and identified in a report to the parties without violating any secrecy rights. The parties would then request the bank customers concerned to consent to inspection of these documents and, in the event of a refusal, the records or information could be obtained—as suggested by the Swiss Government—by letters rogatory[22] or by arbitration proceedings in Switzerland, R. 1955.

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[21] The test of relevancy is contained in Rule 34, F.R.Civ.P.; it could have been spelled out in more concrete terms by the Court for use by the independent investigator as a guide in his investigation.

[22] In most Swiss courts bank secrecy may be penetrated where the information is material to pending litigation. Thus individual

The suggested joint discovery procedures would have been certain to bring about the following without infringing any Swiss laws:

(1) *Identify* all remaining *relevant* documents in the Sturzenegger files, and thus cure the defective designation in the discovery order by ascertaining whether or not the discovery already tendered was complete;

(2) Lay the *groundwork for further joint efforts* to obtain additional disclosure, if needed and desired; and

(3) By identifying the remaining Sturzenegger records, the suggested investigation *would test respondents' claim* that certain relevant papers were not or could not be produced, and that the absence of specific papers would have such an adverse effect on the preparation of respondents' defense that they should not be compelled to submit their taking of petitioner's property to judicial scrutiny.

Denial of jurisdiction affirmed despite tender of substantial discovery and possibility of additional joint discovery procedure

At the expiration of the period of grace allowed by the Court of Appeals, the trial court refused to look at, or to order respondents to inspect the some 200,000 Sturzenegger records tendered by petitioner as best proof that it had substantially complied with the discovery order. In refusing to consider petitioner's

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Sturzenegger records might be inspected without the express consent of bank customers through judicial assistance incidental to letters rogatory. This procedure was expressly recommended by the Swiss Government. R. 1951-55.

claim that these records constituted substantial compliance, the trial court also declined to clarify the faulty designation of the original discovery order. Reiterating once more that petitioner was in no way at fault, R. 1999, it refused to grant an extension of time to permit implementation of the additional joint discovery plan and dismissed petitioner's complaint with prejudice, R. 2017, 2018.

An appeal was taken from this dismissal, but the Court of Appeals affirmed the ruling below, 243 F. 2d 254, reh. *en banc* den.

SUMMARY OF ARGUMENT

I. This case raises a fundamental question as to the power of federal courts to disregard statutory and constitutional provisions in dismissing a complaint for *inability* to comply with a pretrial discovery order rather than for a *refusal* to obey it, thereby denying jurisdiction where, pursuant to the Trading With the Enemy Act, 50 U.S.C. App. 9(a), a divested owner seeks judicial review of the summary taking of his property by the Alien Property Custodian.

II. This basic issue is novel. It has come about because:

(A) The trial court erroneously construed Rule 37(b)(2)(iii) F.R.Civ.P. to permit dismissal in the absence of a finding of wilful refusal to comply with a pretrial discovery order. Rule 37(b)(2)(iii) limits the power to strike pleadings to instances where there was a "refusal to obey" a valid discovery order. All cases where such sanctions have been imposed are predicated on a showing of *wilful* refusal to comply. In *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, which Rule 37 was intended to codify, this Court

limited the power to dismiss to instances where discovery orders were deliberately disobeyed.

(B) The trial court disregarded this Court's pronouncements on the constitutionality of discovery and dismissal measures in *Hovey* v. *Elliott*, 167 U.S. 409 and *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322, where the power to strike any pleadings without trial was limited to instances of wilful noncompliance with discovery orders, so that dismissal could operate on the merits by virtue of a presumption of bad faith in the pleadings of the disobedient party. In the case at bar non-compliance was admittedly involuntary. Under *Tot* v. *United States*, 319 U.S. 463, any presumption of bad faith under those circumstances would in itself be a denial of due process.

(C) Dismissal of petitioner's complaint was based upon an invalid discovery order in which the trial court:

(1) Broadened the established concepts of discovery spelled out in *Hickman* v. *Taylor*, 329 U.S. 495, whereby parties are to be allowed before trial "mutual knowledge of all the relevant facts gathered by both parties". In the case at bar, petitioner was ordered to produce records which were neither known nor available to it.

(2) Ordered discovery of records which were not, as required by Rule 34, F.R.Civ.P., in the possession or custody of petitioner, and over which petitioner had no control as a matter of fact or as a matter of right.

(3) Disregarded the discretionary nature of discovery by imposing upon petitioner an obligation

which was not only oppressive and harassing, but which was in effect a penalty.

III. Although dismissal was predicated upon petitioner's failure to make discovery, the trial court, which had failed to designate the records to be produced with sufficient particularity to allow their identification, refused to examine, or to order respondents to examine, over 200,000 records which petitioner had obtained and made available and which by all indications represented substantial discovery. By thus disregarding material evidence submitted by petitioner in support of its claim of substantial compliance, the trial court denied petitioner a hearing on a vital issue.

IV. The trial court erred in refusing petitioner's request for sufficient time, and for an order requiring respondents to cooperate, in order to implement further discovery procedures which would have permitted full production in the event it had not already been made. In barring petitioner's efforts to make full discovery in the only manner which would not infringe legal rights of third parties and violate Swiss criminal laws, the court unnecessarily caused a conflict with the laws of a friendly nation in which the records are located.

V. Under this Court's rulings in *Stoehr* v. *Wallace*, 255 U.S. 239 and *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, the constitutionality of the vesting of petitioner's property under the Trading With the Enemy Act hinges upon the existence of a remedy to have the legality of such vesting scrutinized by federal courts. Where, as here, jurisdiction is denied through no fault of petitioner, the initial vesting is an unconstitu-

tional taking of private property without due process of law.

ARGUMENT

I. THE TRIAL COURT HAD NO POWER TO DISMISS THE COMPLAINT IN THE ABSENCE OF A FINDING OF WILFUL REFUSAL TO COMPLY WITH DISCOVERY ORDER.

In its order granting the petition for certiorari, this Court invited counsel to discuss, among other points, the power of the lower courts to dismiss petitioner's complaint for failure (here involuntary inability) to comply with a discovery order in the absence of a finding that petitioner had [wilfully] refused to obey. There is no doubt that dismissal of the complaint at bar was ordered only because, in the trial court's opinion, petitioner was *unable* to comply with the discovery order. It is equally undisputed that petitioner did not *refuse* to obey that order; its good faith has been conclusively established and repeatedly confirmed by the lower courts.

In dismissing petitioner's complaint for alleged inability to procure the Sturzenegger records the courts below violated the express language of Rule 37, Federal Rules of Civil Procedure, and the Fifth Amendment to the Federal Constitution. Furthermore, the dismissal was predicated upon a discovery order which was defective under the terms of Rule 34, Federal Rules of Civil Procedure.

(a) Rule 37 F.R.Civ.P. did not authorize dismissal of petitioner's complaint

Rule 37, Federal Rules of Civil Procedure, provides that, in its sound discretion, a court may strike pleadings or dismiss the action of a party who "refuses to

obey" a discovery order.[23] The term "refusal" denotes a wilful act.[24] Where, as in the case at bar, there was no refusal, but continuous *bona fide* efforts to comply;

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[23] Rule 37(b)(2) provides in part as follows:

> "*Other Consequences.* If any party or an officer or managing agent of a party refuses to obey * * * an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, * * * the court may make such orders in regard to the refusal as are just, and among others the following:
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> * * * * * *
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> (iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;"
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> * * * * * * * * *

[24] Rule 37(b)(2) was patterned upon this Court's ruling in *Hammond Packing Co.* v. *Arkansas*. See Notes of Advisory Committee on Rules, Title 28, U.S.C.A., Rule 37 F.R.Civ.P., p. 344. In that case the term "refusal to obey" was employed in the following context:

> "* * * Of course this [the Arkansas discovery statute] necessarily contemplates an honest effort to produce the testimony called for. When that is made, then the statute is complied with; when it is not, as in this case, where the defendant corporation *refused to obey* any part of the order, then the statute is not complied with, and that brings up the gravest question of the case" (212 U.S. 322, 341; emphasis ours).

It is clear that the term "refusal to obey" was intended to imply wilfulness. The term "failure" is distinguishable from "refusal", in that "refusal" involves an act of the will, whereas "failure" may be an act of inevitable necessity. *Taylor* v. *Mason* (1824), 9 Wheat. 325, 343-4 (*per* Ch. J. Marshall); *State* v. *Harland* (Ohio Com. Pl. 1951), 105 N.E. 2d 293, 295; *Maestas* v. *American Metal Co. of New Mexico* (1933), 20 P. (2d) 924, 925, 37 N.M. 203; Black's Law Dictionary, Third Edition (1933), p. 1515, *sub* "refusal".

dismissal is clearly not within the powers conferred by the rule.

The District Court held that the order of dismissal was justified under Rule 37(b)(2)(iii), F.R.Civ.P., even in the absence of wilfulness stating, contrary to the fact, that petitioner "refused" or "declined" to exhibit the bank's records. To bolster its erroneous position, the District Court argued that, in connection with a failure of a witness to appear at a deposition, subsection (d) of the same rule requires such failure to be "wilful", while the word does not appear in subsection (b). *Societe Internationale v. McGranery*, 111 F. Supp. 435, 446.

The reason for the difference in the two subsections is obvious. Every "failure" is not wilful, while a refusal presupposes wilfulness or its equivalent.

The Court of Appeals was unwilling to go as far as the District Court. The former posed the question as follows (96 U.S. App. D.C. 232, 238):

> "Did Chemie refuse to obey? Or, *on the contrary*, has it merely been unable to obey? (Emphasis ours) If the latter, does its inability, though involuntary, nevertheless constitute a refusal under the Rule? The District Court thought it did."

and found it unnecessary to decide "whether Chemie's 'failure' to produce in the circumstances was such a 'refusal' within the meaning of Rule 37 as warranted dismissal of its complaint with prejudice." (*Ibid.* p. 238).

Then the Court of Appeals declared that "it is not a condition to the exercise of the power to dismiss that Chemie's inability to produce be construed as a 'refusal';" and found that Rule 41(b) F.R.Civ.P.

would support dismissal for mere "failure" to comply with a court's order, subject to the test of due process. (*Ibid.* pp. 238-9).

No cases have been found where a court has ever attempted to impose sanctions against a party for its involuntary inability to comply with a discovery order. Sanctions applied under Rule 37(b)(2), its predecessor, Article 15 of the Judiciary Act of 1789 and under corresponding State rules have always been predicated upon an express finding that there had been a wilful refusal to comply with valid discovery obligations; *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322; *Carpenter* v. *Winn*, 221 U.S. 533; *Valenstein* v. *Bayonne Bolt Corp.* (D.C. N.Y. 1946), 6 F.R.D. 363.[25]

In *Carpenter* v. *Winn*, *supra*, a case arising under the Judiciary Act of 1789, this Court repeatedly pointed out that the party upon whom sanctions were to be imposed had to be able to extricate himself by a showing that failure to make discovery was not wilful, there being "good cause" for non-production. The court said in particular:

> "The court will require reasonable proof of the possession and of the pertinency of the papers. If the object of the party is to avail himself of the provisions of the section, so as to move for a nonsuit * * *, he must put the party on his guard, and let him know the consequences of a refusal; and the party receiving such notice will come prepared to meet it. In any such case, when the

[25] Cf. also *Thompson* v. *Selden*, 20 How. 194, 15 L. Ed. 1001; *Merchant's Nat. Bank* v. *Nat. Bank of Commerce*, 3 Cliff. 201, 17 Fed. Cas. p. 53, No. 9448; *Bas* v *Steele*, 3 Wash. C. C. 381, 2 Fed. Cas. p. 988, No. 1088; *U. S. Bank* v. *Kurtz*, (C. C. D. of C. 1822) 2 Cranch C. C. 342, 2 Fed. Cas. p. 702, No. 920; *Maye* v. *Carbery*, (C. C. D. of C. 1822) 2 Cranch C. C. 336, 2 Fed. Cas. p. 1229, No. 9339; *Roth* v. *Paramount Distributing Corp.*, (D. C. Pa. 1948) 8 F. R. D. 31.

party is called on to produce papers, *he may make oath that he has them not, and thus extricate himself from difficulty.*" (p. 542). (emphasis ours)
* * *
"'* * *; leaving the court at liberty to enforce the rule, unless the plaintiff can show, at the trial, good cause for not producing them.'" (p. 543)

In *Hammond Packing Co.* v. *Arkansas, supra;* this Court again confirmed that wilfulness had to be present before an order of dismissal could be entered for failure to comply with discovery-deposition procedures. In sustaining the constitutionality of an order of dismissal entered by Arkansas courts under a local statute, this Court expressly pointed out that the statute did not require the party from whom discovery was demanded to do an impossibility; in other words, failure to comply had to be wilful before the sanctions of the law could be imposed by the Arkansas court. This Court commented as follows upon the scope of the Arkansas discovery statute:

"It is said, conceding that the power which § 8 confers could be exerted under just limitations, yet the order made, which was authorized by the statute, was so *unlimited, so arbitrary and unjust,* as to cause it to be wanting in due process. *This rests upon the assumption that the order to produce the books and papers of the company and the witnesses was imperative, and did not consider the ability of the company to comply,* furnished no compulsory process to compel obedience in case a named witness refused to appear at the request of the company, and therefore *left the company helpless and subject to pains and penalties for a failure to do that which it may not have been in its power to do.* But again, the proposition rests upon the assumption that the statute and the order which conformed to it did that which *the court below decided it did not do.* * * * the court below,

by a construction which is binding here, *expressly decided that neither the statute nor the order were subject to the interpretation which the argument attributes to them.* Indeed, the court impliedly *conceded that if the statute and the order meant that which the argument contends they did mean, both the statute and the order would have been void.* But, in intimating to that effect, it was expressly held that all the statute required was a *bona fide effort to comply* with an order made pursuant to its provisions, and therefore any *reasonable showing of an inability to comply would have satisfied the requirements both of the statute and the order.*" (*ibid.*, pp. 346-47, emphasis ours)

Cf., also, *Valenstein* v. *Bayonne, supra,* where the same principle is stated in a situation in many aspects similar to the one at bar.[26]

The doctrine of *Hammond Packing Co.* v. *Arkansas* and *Carpenter* v. *Winn,* limiting the applicability of Rule 37(b)(2) to instances of wilful refusal to make discovery, is fully borne out by British decisions. It

[26] The Court said in the *Valenstein* case:

"The purpose of the provisions of Rule 37 was to make available to the court the *means of preventing injustice when one party has by his conduct placed the other litigant at an unfair disadvantage.* Where the *guilty* party has *wilfully* disposed of what he knows, or is presumed to know, is or may become evidence in the pending matter, the punishments prescribed may be imposed against him. Where an order of the court has directed that a party permit an inspection of designated items, *disposal by him of those items thereafter for the purpose of rendering impossible the directed inspection* is as apparent a case coming within Rule 37 as could be imagined. *Then* the court may utilize the quoted remedies [Rule 37(b)(2)(ii) and (iii)] or it may make any order which is just. * * *

"But *a court may not, however disposed its feelings may be, go beyond the intent of the rules in imposing penalties.* * * *" (emphasis ours, 6 F. R. D. 363, 365-6)

was thus held in *Danvillier* v. *Myers* (1883), W.N. 58, C.A., that the power to dismiss an action for failure to comply with discovery procedures should not be exercised unless the court is satisfied that the plaintiff is endeavoring to avoid giving the discovery. In *Haigh* v. *Haigh* (1885), 31 Ch. D. 478, 482, it was held that an order striking a defense would only be made where there is a wilful default or negligence on the part of defendant.[27]

(b) Dismissal was not on the merits and therefore it violated the Fifth Amendment, as construed by this Court

The view that Rule 37(b) requires a finding of *wilful* disobedience before dismissal can be entered is made imperative by the constitutional standards established by this Court in connection with discovery and dismissal measures generally, *Hovey* v. *Elliott*, 167 U.S. 409; *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, which Rule 37(b) was expressly intended to codify, *supra*, footn. 24.

In *Hovey* v. *Elliott*, this Court held that, even where it was intended as punishment for contempt,[28] dismissal

[27] Cf. also, to the same effect, 10 Halsbury's Laws of England, Vol. 10, pp. 362-63, 398; *Wilson* v. *Raffalovich* (1881) 7 Q.B. 553, C.A.; *Gray* v. *Hancock* (1887) 56 L.T. 726; *Hartley* v. *Owen* (1876) 34 L.T. 752; *Nelson (James) & Sons, Ltd.* v. *Nelson Line (Liverpool), Ltd.* (1906) 2 K.B. 217, C.A.

[28] Fundamentally, denial of petitioner's right to seek recovery of its property in Federal courts, unless it produces records it is unable to procure, is as much a punishment as dismissal in *Hovey* v. *Elliott*. In *Cummings* v. *The State of Missouri*, 4 Wall. 277, 327, this Court said:

> "To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the

of a complaint or striking of an answer without trial on the merits was a denial of due process of law. (Cf. also *Duell* v. *Duell*, C.A.D.C. 1949, 85 U.S. App. D.C. 78, 83, 178 F. 2d 683, 689.) In the subsequent case of *Hammond Packing Company* v. *Arkansas*, this Court made an exception to the *Hovey* v. *Elliott* rule by upholding a dismissal where the *wilful* refusal of a party to produce records in its actual possession allowed the inference that those records would have been damaging and that consequently the party's pleadings were made in bad faith. Thus, after an express finding of *wilful* refusal, and through the medium of a *rebuttable presumption*, dismissal in the *Hammond* case was on the merits, the disobedient party's claim not being supported by the evidence.[29]

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right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act."

In the case at bar, the "impossible condition" imposed by the trial court was full production of the Sturzenegger records, which the court itself found that petitioner could not obtain.

[29] This Court's language in the *Hammond Packing Company* case is self-explanatory:

"* * * * Is the doctrine of Hovey v. Elliott here applicable? To determine this question we must take into view the authority below, exerted not from a merely formal point of view, but in its most fundamental aspect. * * * Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence *in its possession*, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its *sanction in the undoubted right of the law-making power to create a presumption of fact as to the bad faith and untruth of an answer* to be gotten from the *suppression* or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. In a sense, of course, the striking out of the answer and default was a punishment, but it was only remotely so, *as the generating source of the power was the*

Admittedly, a dismissal in the case at bar does not come within the exception of the *Hammond* case. The alleged non-production of Sturzenegger records was not wilful, and therefore did not allow the lower courts to find by way of presumption that these records would have impaired petitioner's claim and that petitioner's complaint had thus been filed in bad faith. Evidence tending to show not only that the Sturzenegger records contained no damaging evidence, but even that petitioner may have made full discovery as ordered, was disregarded in the proceedings below. Any presumption of bad faith under those circumstances would be unconstitutional under this Court's

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right to create a presumption flowing from the failure to produce. The difference between mere punishment, as illustrated in Hovey v. Elliott, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. *In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.* * * * In its ultimate conception, therefore, the power exerted below was *like* the authority to default or to take a bill for confessed because of a failure to answer, based upon a *presumption that the material facts alleged or pleaded were admitted by not answering*, and might well also be illustrated by reference to many other presumptions attached by the law to the failure of a party to a cause to specially set up or assert his supposed rights in the mode prescribed by law." (pp. 350, 351; emphasis ours).

* * * * *

"As the power to strike an answer out and enter a default, conferred by § 9 of the act of 1905, which is before us, is clearly referable to the undoubted right of the law-making authority to create a *presumption* in respect to the want of foundation of an asserted defense against a defendant who *suppresses or fails to produce evidence* when legally called upon to give or produce, our opinion is that the contention that the section was repugnant to the Constitution of the United States is without foundation." (pp. 353, 354; emphasis ours)

ruling in *Tot* v. *United States*, 319 U.S. 463; cf. also *McMullen* v. *Squier* (1944) CCA 9th, 144 F. 2d 703. In *Tot* v. *United States*, a statute, under which possession of a firearm by a person previously convicted of a crime of violence was to be presumptive evidence of the fact that such firearm had been transported in interstate and foreign commerce by the person in whose possession it was found, was held unconstitutional because:

> "Under our decisions, a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." (pp. 467-68).

In the case at bar, *inability* of petitioner to bring about discovery (the only "fact proved") does not, in common experience, allow the inference that the records petitioner could not obtain would have damaged its case, and that therefore its pleadings were made in bad faith.

It clearly appears, then, that in the absence of a finding of "wilful refusal" and of a resulting inference of bad faith, dismissal of petitioner's complaint was not—as in the *Hammond* case—a ruling on the merits, but was an unconstitutional denial of jurisdiction in a situation where all jurisdictional requirements had been met.

(c) Dismissal was predicated on an invalid discovery order

In addition to the defects inherent in the order dismissing petitioner's complaint, it is further invalidated by the fact that the discovery order upon which it is

predicated does not conform to the requirements of Rule 34, Federal Rules of Civil Procedure. Indeed, the unconstitutionality of the dismissal at bar is directly attributable to the erroneous discovery concepts of the trial court. Only where—as here—a court has ordered production of records not in the actual power of a party, can there be any question of applying the sanctions of Rule 37(b)(2) for involuntary inability as opposed to wilful failure to make discovery.[30]

The lower courts' concept of pretrial discovery was admittedly novel. In several important aspects it was in conflict with this Court's definition of discovery in *Hickman* v. *Taylor*, 329 U.S. 495, and with the views of other federal courts.

Mutuality

This Court held in *Hickman* v. *Taylor* that the new Rules were intended to allow "fullest possible knowledge of the issues and facts before trial" (329 U.S. 495, p. 501), and for that purpose to permit "mutual knowledge of all the relevant facts gathered by both parties" (*ibid.*, p. 507). The term "mutual" means that while discovery is intended to cover all non-privileged records gathered by either party, it extends *only* to records to which the party from whom discovery is demanded does itself have access. It has often been held that a party cannot be compelled to go out and "sue and labor" to procure records it does not have. *Munroe* v. *United States* (1914), CCA I, 216 F. 107.

The courts below departed from this premise of mutuality and demanded production of records which

[30] The close interrelationship between the propriety of discovery orders and the constitutionality of dismissals for failure to comply is brought out very clearly in this Court's opinion in *Hammond Packing Co.* v. *Arkansas*, *supra*.

are not in fact available to petitioner itself, and the contents of which are not known.

Control

Rule 34, Federal Rules of Civil Procedure provides that before a court can order discovery of any records it must be shown that they are "in the possession, custody *or control*" (emphasis ours) of the party from whom discovery is demanded. In all cases known to petitioner it has been held that the term "control" must be given its ordinary meaning and thus implies at least *actual power* over the particular records. *Monroe* v. *United States*, 216 F. 107 (CCA I, 1914); *Fisher* v. *United States Fidelity & Guaranty Co.*, C.C.A. 7th, June 18, 1957, 246 F. 2d 344, 24 Fed. Rules Serv. 37b. 243, Case 3; *In re Harris*, (DC NY 1939) 27 F. Supp. 480. Cf. also *Hadley* v. *MacDougall* (1872) 7 Ch. App. 312; *Fraser* v. *Burrows* (1877), 46 L.J.Q.B. 501; *Kearsley* v. *Philips* (1883), 10 Q.B.D. 36, 40, 465-7; *Hawkes* v. *Schubach* [1953] V.L.R. 468, 2 A.L.R. 874 (Australia). To the courts below, however, "control" for purposes of this discovery order meant something less than actual power to inspect and produce.[31] Indeed, the subsequent dismissal of petitioner's complaint was expressly predicated upon the trial court's belief that, though willing, petitioner *would not be able* to bring about discovery of the bank's records as ordered.

Such a construction is clearly at variance with the Rule and with the views held by other courts.[32] There

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[31] Admittedly petitioner at bar has neither possession nor custody of the bank's records.

[32] Cf. *Hammond Packing Co.* v. *Arkansas*, *supra*, where this Court held the striking of a defense under an Arkansas statute constitutional only because the obligation to make discovery was predicated upon the party's ability to comply.

is also an inherent contradiction in maintaining that petitioner had sufficient "control" over the Sturzenegger records to justify the discovery order, and at the same time dismissing petitioner's complaint because petitioner did not have enough "control" over the same records to insure compliance with the same discovery order.

Discretionary Nature

Discovery under Rule 34 is discretionary with the trial court and is further mitigated by the provisions of Rule 30(b), Federal Rules of Civil Procedure, which prevents use of discovery to harass, embarrass or "as a stratagem to manoeuver the adverse party into an unfavorable tactical position", *Aktiebolaget Vargos et al.* v. *Clark*, D.C. D.C. 1949, 8 F.R.D. 635. Cf. also *Hickman* v. *Taylor*, 329 U.S. 495, at pp. 507-8; *Karlsson* v. *Wolfson*, D.C. Minn. 1956, 18 F.R.D. 474, and numerous other cases where discovery was limited so as to avoid inconvenience and embarrassment to the party from whom it was demanded.

By contrast, both courts below held that they *had no choice* but to dismiss petitioner's complaint without trial on the merits once they had concluded that petitioner could not procure the records as ordered. Clearly, they did not consider discovery as a matter of sound discretion, to be dispensed by courts mindful of practicalities. In their opinion, discovery was a vested right impervious to considerations of convenience, availability and, indeed, of justice. Thus *ability* to make discovery was made into a mandatory jurisdictional requirement although it has never been shown

that the records to be produced contain any material damaging to petitioner's claim.[33]

Such a view is particularly startling in the light of respondents' absolute refusal to cooperate in any efforts designed to insure full discovery, and of the court's refusal to compel respondents to do so because the obligation was imposed upon petitioner and not upon them, R. 627. For all practical purposes the trial court put the fate of petitioner's right to be heard at the mercy of respondents, who were thus enabled to avoid judicial scrutiny of their confiscation of petitioner's property by merely refusing to cooperate in the pretrial discovery process.

Petitioner submits that, in addition to its failure to designate the records to be produced with sufficient particularity to allow their identification, the trial court seriously erred in ordering discovery of the Sturzenegger records. Its novel views on discovery should be rectified by this Court, if only to avoid their being abused by litigants desiring to harass an opponent or, as here, to evade trial on the merits altogether.

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[33] The Swiss Compensation Office, which inspected the Sturzenegger files, found that petitioner was neither an enemy nor controlled by enemies, nor acting as a cloak for them. (R. 205-261; 262-324). It cannot be maintained, therefore, that the lower courts were *compelled* for reasons of justice and in the exercise of sound discretion to order production of the Sturzenegger records if the established inability to produce meant dismissal of petitioner's compiaint without trial on the merits.

II. THE FINDING THAT PETITIONER FAILED TO MAKE DISCOVERY IS DEFECTIVE IN VIEW OF THE TENDER OF SUBSTANTIAL COMPLIANCE AND OF OTHER EFFORTS TO SUPPLEMENT IT IF NECESSARY.

(a) Refusal to inspect over 200,000 records tendered by petitioner as substantial compliance was arbitrary and a denial of due process.

Since dismissal was predicated entirely on petitioner's alleged failure to make discovery, the trial court's summary refusal to examine, or to require respondents to examine, the more than 200,000 records tendered in good faith as best proof of substantial discovery deprived petitioner of its cause of action without a hearing on a crucial issue and thus without due process of law.[34]

Denial of a hearing on substantial compliance was particularly arbitrary in view of the fact that any doubts as to whether the 200,000 or more records thus tendered constituted substantial discovery was attributable to and could be answered only by the trial court itself. Contrary to established procedures in all other courts, Moore's Federal Practice, 2d Ed., Vol. 4, pp. 2444-48, the court's discovery order failed to designate

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[34] Within the time allowed, petitioner tendered for inspection by respondents about 192,000 documents brought to this country, and the 110 books of account of the bank in Switzerland, the latter to the extent that disclosure of the subject matters therein had been consented to by the owners of the banking secrets, R. 1951; 2012-13; and petitioner thereupon moved the trial court to vacate the order of dismissal of December 21, 1953, stating in the memorandum that accompanied the motion that "The District Court should now determine by appropriate hearings and findings whether discovery has been made as required by it. If it has, then the order dismissing the complaint should be vacated." R. 2013. The trial court summarily denied this motion without a hearing by order effective August 3, 1956, R. 2026.

the records to be produced with sufficient particularity to allow petitioner—or indeed anyone—to identify them; *supra,* footn. 12, p. 13. As a result, petitioner had to resort to such guides as a list of crucial names supplied by respondents, *supra,* footn. 20, p. 19, in order to begin to reconstruct the precise scope of discovery intended by the trial court. Petitioner is convinced that, as a result of its efforts, it has tendered substantially all the records demanded. Until the opposite is shown by respondents and determined by the court, or until the court designates the records to be produced with sufficient particularity to permit a finding that they are not all included in the 200,000 documents, petitioner is entitled to assume that the records it has tendered *do* represent substantial compliance with the discovery order. Consequently, dismissal of its complaint was arbitrary and entirely improper in the absence of a valid determination that petitioner had failed to procure and tender the records it was ordered to produce.

(b) Full investigation of the remaining records as suggested by the Swiss Government would have insured complete discovery and thus dismissal was unnecessary

The lower courts also turned down petitioner's request for sufficient time to trace, identify and obtain by other methods of discovery all relevant records, if any, remaining in the bank's files. This additional plan had been suggested by the Government of Switzerland as the only practical method to insure full insight into the remaining Sturzenegger records without violating the vested proprietary rights of bank customers under Swiss law.[35]

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[35] As pointed out above, pp. 20-21, the plan contemplated appointment by the parties of an independent investigator to examine the remaining bank files. The investigator could describe and

The lower courts did not consider the merits of petitioner's proposal and request for time to carry it out. They merely held that the interposition of an independent investigator was not permissible under established discovery procedures, and that they could not require respondents to join forces with petitioner, even for the limited purpose of appointing such an independent investigator and, possibly, of demanding production of certain records by letters rogatory.

The court's position disregards the discretionary and equitable nature of discovery, *supra*, p. 37. Under Rule 30(b) of the Federal Rules of Civil Procedure, a trial court has the power, and indeed the obligation, to take any measures necessary to protect the parties from oppression and harassment through discovery. That power certainly includes the appointment of an investigator where it would save a party from embarrassment and oppression and would prevent the commission of illegal acts under the laws of a friendly nation. Independent investigators have been appointed by Federal courts to protect a party, *Service Liquor Distributors, Inc.* v. *Calvert Distillers Corporation* (DC NY 1955), 16 F.R.D. 513.

In the case at bar, it is highly probable that the joint discovery procedures suggested by petitioner would bring to light the nature and identity of any relevant documents still remaining in the Sturzenegger files.[36]

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identify any remaining relevant documents in a report to the parties at bar. On that basis, further attempts could be made to obtain the consent of any recalcitrant bank customers. If any persisted in their refusal, documents pertaining to them could lawfully be obtained by means of letters rogatory to a Swiss court.

[36] Even if, *arguendo*, some records could not be disclosed as such, the information obtained from the investigator would shed light on the nature and importance of any "missing" Sturzenegger rec-

The purpose of discovery, as stated by this Court in *Hickman* v. *Taylor, supra,* is to give the parties maximum knowledge of relevant information for use in preparation of their case. That the proposed plan would accomplish fully, even if, to do so, it would require the interposition of an independent investigator and some cooperation on the part of respondents.

By not allowing petitioner to implement its additional discovery plan, the trial court barred the only practical way in which petitioner could, without violating the laws of the *situs* of the Sturzenegger records, shed light on the real nature of the remaining papers, not only for use by either party at trial, but also to disprove the theory underlying the court's denial of jurisdiction that the bank records contained evidence damaging to petitioner's claim.

It appears very clearly in the light of the above that dismissal at bar was avoidable, and was thus particularly arbitrary. If the rulings below are allowed to stand, they will permit a party to evade trial on the merits and yet win a judgment by demanding discovery of unidentified records and then refusing to help in obtaining their release and even—preliminarily—in identifying them.

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ords, assuming that any still exists in the bank's files. This means that, instead of dealing, as was done by both lower courts, with speculation and surmise in connection with "missing" Sturzenegger records, they could now be identified so as to permit respondents to show concretely what missing papers are so indispensable in the preparation of their defense as to require dismissal without trial on the merits if the particular records could not be obtained. Indications are that no such "indispensable" documents exist in the bank's files. Nevertheless, both lower courts held that the vague and unsubstantiated possibility of damaging material remaining in the Sturzenegger files was sufficient to warrant dismissal of petitioner's complaint without trial on the merits.

III. DENIAL OF JURISDICTION IN THIS CASE CONTRAVENES THE TRADING WITH THE ENEMY ACT AND TRANSFORMS VESTING INTO A TAKING OF PRIVATE PROPERTY WITHOUT DUE PROCESS OF LAW.

Dismissal in the case at bar was not, as stated above, a dismissal on the merits. Under the doctrine of *Hovey* v. *Elliott*, 167 U.S. 409 and *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322, discussed in chapter I(6) above, the trial court could only have dismissed petitioner's complaint *on the merits* after a trial of the issues of fact or of law, or on a motion for summary judgment, or for neglect or wilful failure to prosecute or to comply with rules or valid orders of the court. The issues in this case are ownership of the vested assets and whether petitioner is a friendly neutral; they have never been adjudicated.

Clearly, then, dismissal of petitioner's complaint was a denial of jurisdiction in contravention of section 9(a) of the Trading With the Enemy Act which imposes a duty on federal courts to adjudicate the issues upon which depends the right of a divested owner to recover his property.

Petitioner's complaint had been duly filed under Section 9(a) of the Trading With the Enemy Act. That section allows any owner of property vested under the Act to file suit in federal courts and to recover his assets if found not to be an enemy, ally of an enemy, or "enemy tainted", *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480. This Court has held that, were it not for the possibility of judicial review under Section 9(a), any taking of property under the sweeping and summary vesting powers[37] of the Trading With

[37] Under Section 5(b) of the Act property of any foreign national can be vested; there need be no determination that the owner is an enemy. 50 U.S.C. App. 5(b).

the Enemy Act would be an unconstitutional taking of property without due process of law. *Stoehr* v. *Wallace*, 255 U.S. 239; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480; *Standard Oil* v. *Markham* (DC NY 1944), 57 F. Supp. 332.

Thus, not only are the provisions of Section 9(a) mandatory because, as stated in *Hovey* v. *Elliott*, *supra*, a court may not strike any pleadings without due process of law (i.e. an adjudication on the merits) after suit has been duly filed and the jurisdictional requirements are met; but, more importantly, by disregarding Section 9(a) the lower courts impaired the validity of the initial vesting of petitioner's property under the Trading With the Enemy Act, in that such vesting became an unlawful taking of private property without due process of law.

It follows from the foregoing that unless petitioner's complaint is reinstated and petitioner is allowed a hearing on the merits thereof, the administrative orders vesting its property without any determination that petitioner was an enemy are void; and the United States Government will have been enriched without such "taking" having been subjected to judicial scrutiny.

CONCLUSION

For the reasons set forth above, petitioner submits that the order of dismissal with prejudice should be set aside and the case remanded for trial of the issues as framed by the pleadings; and

(a) for the vacating of the discovery order of the District Court dated July 5, 1949, insofar as the Sturzenegger Bank records are concerned, or (b) for a preliminary determination in advance of trial on the merits that petitioner's tender of over 200,000 documents and the books of the Sturzenegger Bank represents compliance with the discovery order, and (c) if necessary, that sufficient additional time be allowed petitioner to effectuate such compliance with the discovery order as this Honorable Court may determine will be required under the circumstances.

Respectfully submitted,

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APPENDIX

Constitutional Provision

AMENDMENT V

"* * * nor shall any person * * * ; * * * be deprived of life, liberty, or property, without due process of law; * * * "

Statutes and Rules of Procedure

TRADING WITH THE ENEMY ACT, SECTION 5(b)
TITLE 50, U.S.C., APP. § 5(b)

§ 5. Suspension of provisions relating to ally of enemy; regulation of transaction in foreign exchange of gold or silver.

* * * * * * * * * * *

(b)(1) During the time of war or during any other period of national emergency declared by the President, the President may, through any agency that he may designate, or otherwise, and under such rules and regulations as he may prescribe, by means of instructions, licenses, or otherwise—

(A) investigate, regulate, or prohibit, any transactions in foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing, exporting, hoarding, melting, or earmarking of gold or silver coin or bullion, currency or securities, and

(B) investigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest,

by any person, or with respect to any property, subject to the jurisdiction of the United States; and any property or interest of any foreign country or national thereof shall vest, when, as and upon the terms, directed by the Presi-

dent, in such agency or person as may be designated from time to time by the President, and upon such terms and conditions as the President may prescribe such interest or property shall be held, used, administered, liquidated, sold, or otherwise dealt with in the interest of and for the benefit of the United States, and such designated agency or person may perform any and all acts incident to the accomplishment or furtherance of these purposes; * * *

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TRADING WITH THE ENEMY ACT, SECTION 9(a)
TITLE 50, U.S.C., APP. § 9(a)

§ 9. Claims to property transferred to custodian; notice of claim; filing; return of property; suits to recover

(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other prop-

erty. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act [sections 1-6 and 7-39 of this Appendix] and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

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RULE 30(b), FEDERAL RULES OF CIVIL PROCEDURE

RULE 30. Depositions Upon Oral Examination.

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(b) Orders for the Protection of Parties and Deponents. After notice is served for taking a deposition by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good

cause shown, the court in which the action is pending may make an order that the deposition shall not be taken, or that it may be taken only at some designated place other than that stated in the notice, or that it may be taken only on written interrogatories, or that certain matters shall not be inquired into, or that the scope of the examination shall be limited to certain matters, or that the examination shall be held with no one present except the parties to the action and their officers or counsel, or that after being sealed the deposition shall be opened only by order of the court, or that secret processes, developments, or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from annoyance, embarrassment, or oppression.

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Rule 34, Federal Rules of Civil Procedure

Rule 34. Discovery and Production of Documents and Things for Inspection, Copying, or Photographing.

Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of

the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

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RULE 37, FEDERAL RULES OF CIVIL PROCEDURE

RULE 37. Refusal to Make Discovery: Consequences.

* * * * * * * * *

(b) Failure to Comply With Order.

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or pro-

hibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

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